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IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Petitioners,

v.

MCI WORLDCOM NETWORK SERVICES, INC.,
Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRITS OF CERTIORARI

BOHDAN R. PANKIW
Chief Counsel
ROBERT J. LONGWELL
Deputy Chief Counsel
MARYANNE REYNOLDS MARTIN *
Assistant Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

11678

QUESTIONS PRESENTED FOR REVIEW

1. Where a state intends to preserve its immunity from private party suit under the Eleventh Amendment, can waiver be assumed under federal law when a state commission continues to regulate local telecommunications services and requires its jurisdictional public utilities to comply with the new duties and obligations created by the Federal Telecommunications Act of 1996?

2. Where a state commission is entitled to immunity from private party suit in federal court, can a party aggrieved by an order of the commission obtain federal court review of the order by bringing suit against the individual members of the commission in either their official or individual capacities?

3. Should federal courts apply a *de novo* or deferential standard of review to a state commission's legal interpretations of the Federal Telecommunications Act of 1996 contained in an arbitration and interconnection agreement?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 12.4, two proceedings are at issue.

In the proceeding arising from Third Circuit Docket No. 00-2257, petitioners are Pennsylvania Public Utility Commission; John M. Quain, Robert K. Bloom, John Hanger, David W. Rolka, and Nora Mead Brownell, in their official capacities as Commissioners of the Pennsylvania Public Utility Commission. Respondents are MCI Telecommunication Corporation, MCIMetro Access Transmission Services, Inc., AT&T Communications of Pennsylvania, Inc., Bell Atlantic-Pennsylvania, Inc. (n/k/a Verizon Pennsylvania, Inc.), and United States of America.

In the proceeding arising from Third Circuit Docket No. 00-2620, petitioners are Pennsylvania Public Utility Commission; John M. Quain, Robert K. Bloom, Nora Mead Brownell, and Aaron Wilson, Jr., in their individual and official capacities as Commissioners of the Pennsylvania Public Utility Commission. Respondents are MCI WorldCom Network Services, Inc., MCIMetro Access Transmission Services, LLC, AT&T Communications of Pennsylvania, Inc., TCG Pittsburgh, TCG Delaware Valley, , Bell Atlantic-Pennsylvania, Inc. (n/k/a Verizon Pennsylvania, Inc.), United States of America, Sprint Communications Company, L.P., The United Telephone Company of Pennsylvania, Senator Vincent J. Fumo, Senator Roger A. Madigan, and Senator Mary Jo White.

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PETITION FOR WRITS OF CERTIORARI

CITATION TO ORDERS

The orders challenged were issued by the United States Court of Appeals for the Third Circuit and are reported at (1) *MCI Telecom. Corp. v. Verizon Pa., Inc.*, 271 F.3d 491 (3d Cir. 2001), *reh'g denied, mandate stayed*, and (2) *Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 273 F.3d 337 (3d Cir. 2001), *petition for reh'g denied.*

JURISDICTIONAL STATEMENT

The judgments of the United States Court of Appeals for the Third Circuit were entered on November 2, 2001. The Third Circuit denied rehearing at Docket No. 00-2257 on January 4, 2002, but granted a stay of mandate pending this petition for certiorari. The Third Circuit denied rehearing at Docket No. 00-2620 on January 15, 2002. Pursuant to Supreme Court Rule 12.4, this petition seeks review of both judgments. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are reproduced in Appendix 72a to 75a.

STATEMENT

Introduction

The Pennsylvania Public Utility Commission (PUC) is the administrative agency of the Commonwealth of Pennsylvania that is responsible for regulating the rates and services provided by jurisdictional public utilities, including telecommunications carriers, pursuant to the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 101-3316. It is a "State commission" as that term is defined by section 153(41) of the Federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* (Act or federal Act).[1] In the exercise of its state administrative powers, the PUC requires intrastate telecommunications carriers certified to provide public utility service in Pennsylvania to obey the requirements of state and federal law, including the new duties and obligations imposed by the

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[1] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§151 *et seq.*

federal Act. One undertaking of the PUC is the review and approval of interconnection agreements between carriers pursuant to section 252(e)(1) of the Act.

In two particular cases, carriers who felt aggrieved by a PUC determination approving an interconnection agreement filed a complaint against the PUC and its commissioners in federal district court pursuant to section 252(e)(6) of the Act (providing federal district court review of state commission interconnection agreement determinations) and 28 U.S.C. § 1331 (providing general federal question jurisdiction). The two complaints are in the nature of an appeal. The PUC, an undisputed arm of the Commonwealth of Pennsylvania, and its commissioners raised the affirmative defense of sovereign immunity. Immunity was denied on waiver and *Ex parte Young* grounds. The United States Court of Appeals for the Third Circuit affirmed the denial of immunity. This petition followed.

Statutory Background: Pennsylvania Law Prior to 1996

Competitive local telephone or telecommunications markets were introduced to Pennsylvania in 1993 by passage of "Chapter 30" of the Public Utility Code. 66 Pa.C.S. §§ 3001-3009.[2] Chapter 30 encourages accelerated deployment of affordable, universally available, state-of-the-art broadband communications network in Pennsylvania. *Popowsky v. Pennsylvania P.U.C.*, 550 Pa. 449, 706 A.2d 1197, 1199 (1997). It calls for and encourages a diversity of supply and the development of competition in local telecommunications markets. 66 Pa.C.S. § 3001 (4), (7), and (8).

Upon passage of Chapter 30, pursuant to 66 Pa.C.S. §3009(a), the PUC issued certificates of public convenience to competitive telecommunications providers thereby allowing them to compete with the incumbent Bell Atlantic-

[2] Since then, the General Assembly has expanded competition to the fields of electricity and natural gas.

Pennsylvania, Inc. The competitive carriers included MFS Intelenet of Pennsylvania, Inc., MCI Metro Access Transmission Services, Inc., TCG Pittsburgh, and Eastern Telelogic Corp.

Federal Telecommunications Act of 1996 Complements Pennsylvania Law

In 1996, Congress altered the regulatory scheme for local telephone service on a national level. The Telecommunications Act of 1996 requires that local service be opened to competition according to standards established by federal law. Under the federal Act, the incumbent local telephone service carriers must negotiate or arbitrate agreements with competitive local carriers, allowing entering carriers either to connect their equipment to the existing network or to purchase or lease elements and services of the existing network. The terms, rates, and conditions of such arrangements are set forth in interconnection agreements established between the carriers. The state utility commissions are asked to review and give final approval to interconnection agreements to ensure that they comport with federal law. 47 U.S.C. § 252(e)(1).

The Congressional goals advanced by the Act are consistent with the General Assembly's goals advanced by Chapter 30. *Bell Atlantic-Pa., Inc. v. Pennsylvania P.U.C.*, 763 A.2d 440, 453 (Pa. Cmwlth. 2000)(*en banc*), *alloc. granted on different grounds*. In Pennsylvania, every action required of a State commission by the federal Act can be matched to a pre-existing right or duty under state law. The terminology may differ, but the power is comparable. Thus, the PUC implemented the Act in Pennsylvania and continues to require certificated carriers to obey all lawful state and federal requirements.

The relationship between Chapter 30 and the federal Act was misapprehended by the Third Circuit. Due to an overly

broad reading of *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 370 (1999) (Iowa Utils. I), the Third Circuit opined that local telephone service in Pennsylvania operated as a monopoly prior to 1996. But, as explained, the fact is that Chapter 30 (not federal law) ended the monopoly regime in Pennsylvania. The court's error is significant to its waiver analysis to the extent that it relies upon preemption.

Middle District Case: Review of "MFS III" Determination

In 1995, MCI Metro Access Transmission Services, Inc. and other competitive carriers asked the PUC to adjudicate disputed issues concerning access to the network of Bell Atlantic-Pennsylvania, Inc. (n/k/a Verizon Pennsylvania, Inc.) and the rates for such access. During the pendancy of this proceeding originated under Chapter 30, the Telecommunications Act of 1996 became law. In response to this change of law, the scope of the proceeding was adapted to include application of both the existing state and the new federal law requirements.

Verizon also entered into negotiations with MCI (n/k/a WorldCom), a competing carrier which sought to provide local telephone service. After various negotiations and proceedings by the PUC, the parties established an interconnection agreement and submitted it to the PUC which approved it contingent on certain revisions and the incorporation of certain rates. These revisions and rates were established by the so-called "MFS III" proceeding, signifying phase III of the proceeding. Phase I ("MFS I") related exclusively to Chapter 30 while Phase II ("MFS II") involved a transition from purely Chapter 30 to inclusion of the rights and obligations imposed by the new federal Act.

Upon conclusion of the proceedings, WorldCom challenged the lawfulness of the approved interconnection agreement by initiating a suit in the United States District Court for the Middle District of Pennsylvania against

Verizon, the PUC, and the PUC Commissioners in their official capacities (see caption, App. 1a), pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Verizon counter-claimed and cross-claimed to challenge other aspects of the agreement. The PUC and PUC Commissioners moved to dismiss the action, arguing that they were immune from suit under the Eleventh Amendment of the United States Constitution. The District Court rejected the immunity clajm and the PUC did not appeal at that time. The District Court then resolved all the substantive claims asserted by WorldCom and Verizon, including a question about directory publishing services. The PUC and Verizon each appealed and the appeals were consolidated in the United States Court of Appeals for the Third Circuit. The Third Circuit had jurisdiction over the final decision of a District Court, pursuant to 28 U.S.C. § 1291. Its decision is reported at 271 F.3d 491 (App. 1a).

Eastern District Case: Review of "Global Order" Determination

In 1999, competing petitions were filed with the PUC by two groups of carriers, one consisting of Verizon and other companies, the other consisting of AT&T, WorldCom, several State Senators, and others who had opposed Verizon in various PUC proceedings. Among other things, a review of the pricing determinations made in the MFS III proceeding was requested.

In September 1999, the PUC issued a Global Order, resolving a multitude of issues before it and ordering that the decisions be incorporated into interconnection agreements. Generally, the pricing established in MFS III was modified resulting in lower rates for competitive carriers. Verizon thought the new rates were too high; competitors thought the new rates were too low. Appeals followed.

One appeal was the traditional state law appeal of a PUC order taken in the Commonwealth Court of Pennsylvania

against the PUC. Verizon petitioned the Commonwealth Court to review the Global Order for compliance with state and federal law. Cross-petitions were filed by WorldCom, AT&T and others. After briefing and oral argument, the Global Order was affirmed in all respects. *Bell Atlantic-Pa., Inc. v. Pennsylvania P.U.C.*, 763 A.2d 440 (Pa. Cmwlth. 2000) (*en banc*), *alloc. granted.*

A second appeal was filed on the same day as the first appeal. Verizon filed a complaint in the United States District Court for the Eastern District of Pennsylvania against the PUC as well as the members of the commission in their individual and official capacities (including sitting members of the majority and the one commissioner who dissented). (Caption, App. 5a). After more than three months elapsed, WorldCom and AT&T filed cross-claims and counterclaims against the PUC and all the sitting commissioners. The United States intervened as plaintiff to defend the constitutionality of § 252(e). The PUC, several PUC Commissioners, and the State Senators moved to dismiss all the claims on the ground that the PUC and commissioners were immune from private party suit in federal court. The PUC also moved to dismiss WorldCom's and AT&T's claims as untimely and, alternatively, argued the federal court should abstain from hearing the case, pursuant to a variety of federal abstention doctrines, in light of the then-pending state court proceeding.[3] The District Court denied the motions to dismiss in a decision reported at 107 F.Supp.2d 653. The PUC and Senators each appealed and the appeals were consolidated in the Third Circuit. The Third Circuit had jurisdiction over the final decision of a District Court,

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[3] On October 25, 2000, subsequent to the District Court denial of the PUC's motion to dismiss, but before disposition of the PUC's federal appeal, the Commonwealth Court entered judgment in the state court appeal.

pursuant to 28 U.S.C. § 1291. The Third Circuit decision is reported at 273 F.3d 337 (App. 5a), as a companion decision to 271 F.3d 491.

Third Circuit's Analysis of PUC's Immunity Claims

The Third Circuit decided that the PUC and the Commissioners are not entitled to Eleventh Amendment immunity from suit in federal court under the Act. The court rejected the PUC's position that implementation of the Act is an act of fealty to the PUC's duties under the Public Utility Code and a recognition of the supremacy of federal law, but not more. Instead, the Third Circuit held that implementation constitutes a voluntary acceptance of a conditional gift from Congress, that "gift" being the ability to regulate local telecommunications competition and a "condition" being waiver of immunity. In a concurring opinion, Judge Ambro agreed with the majority's conclusion that the Commonwealth has waived its sovereign immunity by regulating, but he noted the apparent shift to expand the scope of the "gratuity waiver" exception discussed in *College Savings Bank*. "Rather than requiring a 'clear declaration by the State,' *College Sav. Bank*, 527 U.S. at 680, we now require a clear declaration from Congress that, by accepting the gratuity, the states will forfeit whatever rights Congress chooses to attach as a condition." 271 F.3d at 524 (Ambro, J. Concurring) (App. 50a). He further noted, the "'gratuity waiver' of the Commonwealth that we approve today lacks on its face any indicia of being intentional. The Pennsylvania Utility Commission has steadfastly maintained that it did not intend to waive its immunity from suit and that its arbitration and approval of the interconnection agreement was an action taken pursuant to state law, not the 1996 Act." *Id.* at 525 (App. 51a). Nevertheless, an acceptance of the purported conditions was found due to "the failure to refuse the grant of an authority previously possessed." *Id.* at 526 (App. 52a).

Third Circuit's Analysis of Commissioners' Immunity Claims

The individual commissioners' claims of immunity were rejected under the doctrine of *Ex parte Young*. The *Young* doctrine was applied as an alternative theory to acquire jurisdiction over the challenged PUC determinations. The actions against the individual PUC Commissioners are said not to be barred by the Eleventh Amendment because if the terms of the approved interconnection agreements[4] violate the Act, as alleged in the underlying complaints, that violation constitutes an ongoing violation of federal law. An injunction prohibiting enforcement of the agreements and requiring the PUC to establish different, more appropriate rates, terms, and conditions is said to be "the paradigmatic *Young* framework." 271 F.3d at 514 (App. 32a). The court concluded that neither of the two recognized exceptions to Young bars the instant action. First, the "special sovereignty interests" exception in *Coeur d'Alene* was not applied on the ground that "[a]ny sovereign interest that the Commonwealth might have in regulating local telephone competition exists solely by virtue of the role that Congress bestowed upon the states in § 252(e); the state interest in regulating in this area no longer derives from its general sovereign powers." *Id.* at 515 (App. 32a-33a). Second, the *Seminole Tribe* exception for a detailed and limited remedial scheme was held inapplicable because section 252(e)(6) "places no restrictions on the scope of the court's review or on the remedies it may impose." *Id.* (App. 33a).

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[4] In the Eastern District case, there was no approval of a specific interconnection agreement, rather, approval was given to certain generic rates, terms and conditions that were ordered to be incorporated into interconnection agreements.

Third Circuit's Analysis of the Standard of Review

Another question arising from the Middle District action was whether it was lawful for the PUC to Verizon to sell directory publishing services at wholesale rates as a telecommunications service.[5] Verizon argued that directory publishing services were not telecommunications services under the Act. The Middle District Magistrate Judge agreed with the PUC's interpretation of the Act and rejected Verizon's argument, but the District Court struck down this provision of the agreement. On appeal, the Third Circuit applied a *de novo* standard of review (instead of the deferential standard argued by the PUC) and affirmed the District Court. The Third Circuit reasoned that even though the PUC was acting on behalf of Congress, the PUC was not a federal agency, and therefore, the PUC's interpretation of the Act was not entitled to deference in federal courts.

REASONS TO GRANT THE WRITS

This Petition presents substantial questions of national scope for this Honorable Court's consideration. The Third Circuit has recognized the special importance of the questions presented. See Order granting Stay of Mandate (App. 69a).

The Court should grant this petition for writs of certiorari to preserve the integrity of the Court's rulings in *College Savings Bank* and *Seminole Tribe*. Despite a clear expression of Pennsylvania's intent not to waive immunity, the Third Circuit has held that Petitioners are subject to federal court jurisdiction on a private party suit brought under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. If the Third Circuit's decisions are allowed to stand, Congress will have free reign to

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[5] Directory publishing services include basic listings with customer telephone numbers, as well as additional services such as vanity numbers, bold and foreign listings in the White Pages, and non-listing and non-publication of customers' telephone numbers.

abrogate state sovereign immunity at will. Such a result would be contrary to the anti-constructive waiver holding of *College Savings Bank* and the anti-abrogation holding of *Seminole Tribe*. Thus, the Third Circuit's decisions must be reversed.

The Court should also grant this petition to decide the proper scope of the *Ex parte Young* doctrine. While the doctrine has a place in our national jurisprudence, the Third Circuit applied it so indiscriminately that its application nullifies Eleventh Amendment protections. The form of the underlying pleadings has been elevated over the substance contrary to the holding of *Pennhurst II*, which bars suits against state officials when the state is the real party in interest. The Third Circuit has decided that a quasi-judicial state official who has the right and responsibility to decide disputes presented to a state administrative agency will be exposed to federal suit in his or her individual, as well as official capacity, if he or she makes a wrong (or even right) decision. This application of *Ex parte Young* is overly broad and contrary to the doctrine's principles. There is no evidence that Congress intended nor is there any need for such a result. Thus, the Third Circuit's decisions must be reversed.

The Court should also grant this petition to decide what standard of review should apply when, and if, a federal court reviews a state commission's determination under § 252 of the Act. Should the standard be *de novo*, as the Third Circuit held, or deferential? If one accepts that state commissions are now "regulating on behalf of Congress," 271 F.3d at 510 (App. 25a), and are thereby authorized to develop federal telecommunications policy, then federal courts should defer to state commissions' interpretations of the Act. The PUC urges a deferential standard as consistent with the faith placed by Congress in state commissions and state commissions' recognized expertise in handling the complexities of local telecommunications regulation.

Finally, this petition should be granted because the immunity issues raised herein are substantially similar, but not identical, to the issues pending before the Court in both *Verizon Maryland, Inc. v. Public Svc. Comm'n of Md.*, Nos. 00-1531 and 00-1711 (U.S.) (reviewing *Bell Atlantic Md., Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001)), and *Mathias v. WorldCom Tech., Inc.*, No. 00-878 (U.S.) (reviewing *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566 (7th Cir. 1999)). The pending cases involve immunity in the context of enforcement proceedings, whereas this petition concerns immunity in the context of arbitration proceedings.

ARGUMENT

I. SINCE PENNSYLVANIA HAS NOT WAIVED IMMUNITY, FEDERAL COURTS SHOULD NOT HAVE EXERCISED JURISDICTION OVER THE PUC IN THE UNDERLYING PRIVATE PARTY SUITS BROUGHT PURSUANT TO 47 U.S.C. § 252(E)(6) AND 28 U.S.C. § 1331.

Generally, States are immune from suit by private parties in federal court pursuant to the doctrine of sovereign immunity as protected by the Eleventh Amendment. U.S. CONST. amend. XI; *Board of Tr. of Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 962 (2001); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). This immunity extends to state agencies and departments. See *C.H., ex rel. Z.H. v. Oliva*, 226 F.3d 198, 201 (3d Cir. 2000) (*en banc*). Immunity is subject to three exceptions: 1) congressional abrogation, 2) state waiver, and 3) suits against individual state officers for prospective relief to end an ongoing violation of federal law. None of the exceptions should have been applied in these cases.

A. Immunity Has Not Been Abrogated

The first exception—abrogation—cannot apply because the Telecommunications Act of 1996 was an exercise of congressional Commerce Clause power. Congress may not abrogate state sovereign immunity when a statute is passed pursuant to its Article I powers, such as the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. *Garrett*, 121 S. Ct. 962. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996). But for *Seminole Tribe*, section 252(e)(6) may well have been viewed as an abrogation of immunity.

B. Immunity Has Not Been Waived

The second exception—waiver—does not apply because Pennsylvania has not consented to suit. Consent is necessary to find waiver. *College Savings Bank*, 527 U.S. at 670. The waiver by the state must be voluntary and the test for determining voluntariness is a stringent one. *Id.* at 675. The state either must voluntarily invoke federal court jurisdiction by bringing suit (not the case here) or must make a "'clear declaration' that it intends to submit itself" to federal court jurisdiction. *Id.* at 676. The decision to waive immunity must be an "altogether voluntary" one, and, as with any other waiver of a constitutional right, there must be an "intentional relinquishment or abandonment of a known right or privilege." *Id.* at 681-82. Correspondingly, Congress must speak with a "clear voice" to ensure that states exercise their choice cognizant of the consequences. *Pennhurst State Sch. And Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*).

The constructive waiver doctrine formerly established in *Parden v. Terminal R. of Alabama State Docks Dept.*, 377 U.S. 184 (1964) has been overruled. *College Savings Bank*,

527 U.S. at 680 ("Whatever may remain of our decision in *Parden* is expressly overruled."); *id.* ("We think that the constructive-waiver experiment of Parden was ill conceived, and see no merit in attempting to salvage any remnant of it."). The constructive waiver theory was abolished to prohibit Congress from statutorily coercing a state into relinquishing its sovereign immunity on threat of the state being excluded from participating in an otherwise lawful and permissible activity. *College Savings Bank*, 527 U.S. at 687; *id.* at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."). "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748, (1999).

The difficulty faced by the Third Circuit was that *College Savings Bank* distinguished conditional types of constructive waiver in two cases. In *Petty v. Missouri Bridge Comm'n*, 359 U.S. 275, 277-78 (1959), two states entered into an interstate compact, approved by Congress, that contained a sue-or-be-sued clause. The Court held that the states assumed the conditions, such as consent to suit, that Congress attached to the compact by accepting the conditions and acting on the compact containing those conditions. *Id.* at 281-82. In *South Dakota v. Dole*, 483 U.S. 203, 208-09 (1987), the Court upheld a federal law, passed pursuant to the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, that conditioned a state's receipt of federal highway funds on the establishment of a minimum drinking age of 21 in the state; the Court found that the condition on the funds was clearly stated and that acceptance of the funds entailed agreement to those conditions. The *College Savings* Court described these cases as "fundamentally different" from *Parden*-type forced constructive

waivers because both the grant of consent to form an interstate compact and the disbursement of federal monies are congressionally bestowed gifts or gratuities, which Congress is under no obligation to make, which a state is not otherwise entitled to receive, and to which Congress can attach conditions as long as the conditions are not coercive. *College Savings Bank*, 527 U.S. at 686-87.

Here, the Third Circuit has erroneously concluded that Pennsylvania waived immunity when the PUC continued to regulate local telecommunications competition. The court erred by reading *College Savings Bank* to allow Congress "attach whatever conditions it chooses," 271 F.3d at 505 (App. 15a), to a congressional gratuity. It also erred in holding that state regulation is a congressional gratuity. *Id.* at 509 (App. 23a). The court's gratuity holding is a misapplication of 47 U.S.C. § 261(b) in that the court held "with the 1996 Act, Congress federalized the regulation of competition for local telecommunications service. . . . The state commission's authority to regulate comes from §252(b) and (e), not from its own sovereign authority." *Id.* at 509-510 (App. 23a-25a). The Third Circuit further mischaracterize the Act as "giving [states] back some regulatory power," *id.* at 510 (App. 24a), subject to "any condition [Congress] chooses." *Id.* (App. 25a). The conditions include: 1) waiver of immunity under section 252(e)(6), and 2) exclusivity of federal court review under section 252(e)(4). These conditions are said to be "sufficiently clear" from the language of the Act. 271 F.3d at 512 (App. 28a). This legal theory is wholly without merit. It rests on the extraordinary notion that Pennsylvania received a "gratuity" in a simultaneous removal and return of authority to regulate local telecommunications competition under the Act.

The Third Circuit's view does not enjoy full concurrence among the Courts of Appeals. The Fourth and Sixth Circuits have rejected similar reasoning. *Bell Atlantic Md., Inc. v.*

MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001), *cert. granted*, 533 U.S. 928 (2001) (upholding immunity claims of Maryland commission); *Bell South Telecomms. v. North Carolina Utils. Comm'n*, 240 F.3d 270 (4th Cir. 2001) (upholding immunity claims of North Carolina commission); *GTE North, Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000) (opining "the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions."). Similarly, scholars have criticized the theory. Case Comment, State Sovereign Immunity: *MCI Telecom. v. Illinois Bell*, 114 HARV. L. REV. 1819 (2001); Jake C. Blavat, Note, 2000 WIS. L. REV. 1149 (2000) (arguing Eleventh Amendment denies federal court jurisdiction over state commissions that implement the Act).

1. ***Congress Does Not Occupy Entire Field of Local Telecommunications Competition And Invite States To Regulate Subject to Waiver and Other Conditions, But If It Does, Then Its Actions Are Impermissibly Coercive.***

Congress' power to regulate the American economy includes the power to regulate local telecommunications competition. U.S. CONST. art. I, § 8, cl. 3; *AT&T Corp.*, *supra*. Pursuant to Commerce Clause powers, the Act imposes certain duties and obligations on local exchange carriers for the purpose of advancing the development of competitive markets. See 47 U.S.C. § 251 (setting forth duties). These duties and obligations overlay existing state requirements, which state requirements are preserved as long as they are not inconsistent with the Act. 47 U.S.C. § 261(b). The FCC resolves any questions of conflict after notice and comment. 47 U.S.C. § 253(d).

Congress relies upon the expertise of state commissions to carry out the congressional aims. A number of states, like Pennsylvania, had embarked upon the development of competitive markets and Congress was desirous of letting

them continue. See, e.g., *Local Competition Order*, 11 FCC Rcd 15499 (FCC 96-325, rel. Aug. 8, 1996) at para. 2 (FCC finds it has "benefited enormously from the expertise and experience" of the state commissioners and their staffs); *see also id.* at para. 53.

Aware that some states might not have sufficient resources to undertake the development of competitive markets, at least not immediately, *Local Competition Order* at para. 48 (noting limited resources of North Dakota commission), Congress called upon the FCC to shoulder the burdens of implementing a pro-competitive regulatory regime in those instances where a state was unable or unwilling to do so. 47 U.S.C. § 252(e)(5). But, Congress emphasized its dependence upon state commissions by requiring carriers to approach the state commissions in the first instance. 47 U.S.C. § 252(e)(1).

In Pennsylvania, implementation of the Act was swift.[6] Given the General Assembly's previous commitment to the development of competitive markets, there was also no need to amend the Public Utility Code. Every duty and obligation imposed on carriers and corresponding power of a state commission contemplated by the Act is provided for under the Code.[7]

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[6] The PUC has not pursued an argument that the Act constitutes an impermissible commandeering of state resources under *Printz v. U.S.*, 521 U.S. 898 (1997).

[7] For example, the PUC regulates "interconnection agreements" because, among other things, it has the general administrative power and authority to supervise and regulate all public utilities doing business in Pennsylvania, 66 Pa.C.S. § 501(b) and to vary, reform and revise contracts entered into by these public utilities, 66 Pa.C.S. § 508. The PUC sets "interconnection and network element charges" and "wholesale prices" because it has the power to fix just and reasonable rates for the services provided by telecommunications utilities to customers, 66 Pa.C.S. § 1301, and, to require a telecommunications utility to "unbundle" basic network functions necessary for delivery of competitive services, 66 Pa.C.S. § 3005(e)(1).

Recently, the FCC recognized the successful implementation of the Act in Pennsylvania. "[L]ocal exchange markets in Pennsylvania [are open] to competition. . . . [C]ompeting carriers in Pennsylvania serve approximately one million lines, one-third of which are residential, using all three entry paths available under the Act." *In the Matter of Applications of Verizon Pa., Inc.*, 16 FCC Rcd 17419 (FCC 01-269, rel. Sep. 19, 2001) at paras. 1, 2.

Even *assuming arguendo* that Congress has the power to occupy the entire field of local telecommunications competition regulation, there is no provision of the Act indicating Congress' intent to do so. In fact, Congress specifically prohibited construction of any provision as preempting any State commission from enforcing regulations prescribed prior to and after the date of enactment, if such regulations are not inconsistent with the Act. 47 U.S.C. § 261(b). Thus, state authority is generally preserved, not eliminated.

There is also an absence of any language (or legislative history) to support a finding that Congress intended to extend a conditional invitation to states.[8] The best text any opponent can produce as providing notice of a conditional invitation is section 252(e)(5), which provides for the FCC to step into the shoes of the states in certain circumstances. Only one with an active imagination, however, can construct such an intent from section 252(e)(5). Rather than an invitation to engage in regulation, it merely ensures the new requirements are implemented nationally, even in those states with limited financial or technical resources.

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[8] Unlike the Act addressed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), Congress did not advise the States that they had to submit to federal authority in order continue regulating. See *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231 (3d Cir. 1995) (addressing Pennsylvania's actions under the *Hodel* scheme).

Alternatively, if section 252(e)(5) is an invitation with conditions attached, the invitation is coercive. What reason other than coercion does any state have to agree to do work for the benefit of Congress, without getting paid for the resources spent, waive their immunity, and disassociate their administrative agencies from the oversight of its state courts! "Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." *College Savings Bank*, 527 U.S. at 683. Thus, the invitation is tantamount to abrogation and cannot be given effect.

2. *Pennsylvania Intends to Preserve its Immunity, not Waive It.*

The Constitution of the Commonwealth of Pennsylvania reserves to the General Assembly the right to waive immunity from private party suit. PA. CONST., art. I, § 11; *Chittister v. Dep't of Commun. and Econ. Dev.*, 226 F.3d 223, 227 (3rd Cir. 2000). A private party wishing to sue the Pennsylvania Commission must refer the Court to "any provision expressly waiving Pennsylvania's Eleventh Amendment immunity." *Pennhurst II*, 465 U.S. at 103 n. 12. "Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

The General Assembly has not expressly authorized the PUC to waive immunity.[9] Rather, it is the General Assembly's intent that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit. 1 Pa.C.S. § 2310 (West Supp. 2000). Any exceptions are provided for by statute. *Id.*

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[9] The PUC is a creature of the General Assembly and has only those duties, responsibilities and jurisdiction given to it by the General Assembly. *Western Pa. Water Co. v. Pa. P.U.C.*, 311 A.2d 370, 373 (Pa. Cmwlth. 1973).

Immunity has been waived only in a select number of circumstances. The specific instances of waiver are found in 42 Pa.C.S. § 8522 (relating to judiciary and judicial procedure) and 62 Pa.C.S. § 1702 (West Supp. 2001) (relating to procurement). Due to their complete silence on the matter, none of these provide any support for finding waiver under the federal Act. Likewise, nothing in the PUC's enabling statute specifically provides for waiver of immunity in regard to the Act. Certainly, the pre-1996 provisions of the Public Utility Code cannot be fairly read to direct the PUC to continue regulating pursuant to so-called voluntary conditions of a later enacted federal statute.

The General Assembly reaffirmed its sovereign immunity in 1998, two years after passage of the Act, in 1 Pa.C.S. § 2310. This post-1996 affirmation of sovereign immunity either directly contradicts a finding of waiver or creates ambiguity.

In spite of Pennsylvania's silence, the Third Circuit premised a finding of waiver upon the Seventh Circuit's rationale that waiver can be inferred if a State has not "taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress." *MCI Telcomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 n. 10 (7th Cir. 2000), cited at 271 F.3d at 511-512 (App. 27a); *id.* at 525-26 (App. 52a) (Ambro, J., concurring) ("Congress . . . has mandated that the states take action if they do not wish to waive their immunity. Conversely, the affirmative act indicating an intention to accept the gratuity is not the simple acceptance of new money or new authority, it is the failure to refuse the grant of an authority previously possessed.") (footnote omitted). The Third Circuit's view is indistinguishable from the "constructive waiver" doctrine discredited by this Court in *College Savings Bank*. Thus, the Court should grant this petition and reverse the Third Circuit's decision.

3. *Clear Notice of the Waiver Condition Is Lacking.*

Section 252(e)(6) is said to provide notice that a state's immunity will be waived if the state commission continues to regulate. 271 F.3d at 512 (App. 28a). It provides that a party aggrieved by a state commission's determination "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. § 252(e)(6). Contrary to the "clear voice" requirement of *Pennhurst I*, 451 U.S. at 17, the plain language of section 252(e)(6) does not make one cognizant of the consequence of immunity waiver upon regulation. The most reasonable reading (since it does not abrogate immunity) is that the section gives a district court jurisdiction to review certain state orders, subject to the constitutional doctrine of state sovereign immunity. *Cf.* 28 U.S.C. § 2342 (providing court of appeals has exclusive jurisdiction to review orders of the FCC). The district court's jurisdiction is not superior to immunity. Rather, "the constitution is superior to any ordinary act of the legislature[;] the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). If there is a hint of notice of waiver, it is most certainly buried in "ambiguity." *See AT&T Corp.*, 525 U.S. at 397. Thus, the Act does not provide states with the requisite clear notice that immunity will be waived if a state commission regulates.

4. *States Should Not Be Penalized for Applying Federal Law.*

Members of the Pennsylvania commission, and other commissions, take an oath to uphold the federal Constitution. The fact that a state commission requires its state certified public utilities to obey the new requirements of a federal law should not be deemed a waiver of constitutional protections. Instead, implementation of the Act demonstrates respect for

the supremacy of federal law. U.S. CONST. art. VI (Supremacy Clause). Inferring waiver from implementation improperly penalizes the PUC for requiring public utilities to follow federal law.

5. *Congress Is Not Allowed To Abrogate Immunity At Will.*

The Third Circuit's decision effectively allows Congress to abrogate state sovereign immunity at will, contrary to *Seminole Tribe* and *College Savings Bank*. What the Third Circuit failed to recognize is that "the bounds of the 'gratuity' exception—and hence the scope of state sovereign immunity itself—must be defined by the text and the structure of the Constitution, not by Congressional decree." Case Comment, 114 HARV. L. REV. 1819. The Third Circuit has "effectively converted sovereign immunity—a constitutional right and limitation on federal power—into little more than a rule of statutory construction Congress can abrogate at will." *Id.* at 1826.

II. *EX PARTE YOUNG* DOES NOT GIVE FEDERAL COURTS JURISDICTION OVER COMMISSIONERS WHEN A PARTY IS AGGRIEVED BY A §252 DETERMINATION.

The third exception—the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908)—does not apply. The doctrine allows suit against individual state officers for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law. The theory behind *Young* is that a suit to halt the enforcement of a state law in conflict with the federal constitution is an action against the individual officer charged with that enforcement and ceases to be an action against the state to which sovereign immunity extends; the officer is stripped of his official or representative character and becomes subject to the consequences of his individual conduct. *Young*, 209 U.S. at 159-60; *Pennhurst II*, 465 U.S.at

103. The relief sought must be prospective, declaratory, or injunctive relief governing an officer's future conduct and cannot be retrospective, such as money damages. *Pennhurst II*, 465 U.S. at 102-03. The *Young* doctrine is viewed as necessary to permit federal courts to vindicate federal rights and to hold state officials responsible to the "supreme authority of the United States." *Id.* at 105. However, *Young* does not apply if, although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit in fact is against the state. *Pennhurst II*, 465 U.S. at 101.

An action cannot be maintained under *Young* when the suit against the state officer affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state. *See, e.g., Coeur d'Alene*, 521 U.S. at 287; *id.* at 296-97 (O'Connor, J., concurring in part and concurring in the judgment). This exception is best understood as an application of the general rule that Young does not permit actions that, although nominally against state officials, in reality are against the state itself. *Pennhurst II*, 465 U.S. at 102. *See also Seminole Tribe*, 517 U.S. at 74.

1. Ex parte Young *Does Not Permit a Suit to Go Forward Against State Officials When the State Is the Real Party in Interest.*

The underlying complaints are an appeal of an administrative agency decision in which federal law has been applied. Application of the *Young* doctrine to allow federal suit against individual members of a State commission without their consent—merely due to the commissioner's vote with respect to the approval, rejection or enforcement an interconnection agreement under section 252 of the Act—completely undermines the constitutional doctrine of sovereign immunity. It is also contrary to the proper application of the *Young* doctrine. The party claiming to be aggrieved, not the State, initiates a section 252 proceeding. A commissioner

has a duty to vote on matters brought before the Commission for resolution, absent a conflict of interest or other infirmity. As the Fourth Circuit has correctly recognized, it is an affront to a State's sovereignty to bring an individual State officer before a federal court to answer to the assertion of a private citizen that the officer, acting in a quasi-judicial capacity, cast a wrong vote while acting within the scope of his or her authority. *Bell Atlantic Md., Inc.*, 240 F.3d at 298.

It is an administrative agency, not individual officials within the agency, which defends its own decision when a party seeks judicial review of that decision.[10] The agency is the real party in interest in such a proceeding, consistent with both federal and state law. Federal courts have routinely found state agencies to be the only proper party in an action challenging that agency's order.[11] "The Eleventh Amendment bars a suit against state officials when 'the state is the real party in interest.'" *Pennhurst II*, 465 U.S. at 101. *See* U.S. CONST. amend. XI; *Coeur d'Alene*, 521 U.S. at 269.

The State commission acts in the public interest of the people within its State when a State commission makes a determination to approve or reject an interconnection agreement between regulated utilities. "The actions taken by a state will significantly affect the development of local competition in that state." *Local Competition Order* at para. 137. The regulation of utilities itself "is one of the most important of

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[10] All members of a commission may not have concurred in the agency's decision.

[11] *See Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3d Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate its rules); *Stevens v. Bartholomew*, 222 F.2d 804, 806 (D.C. Cir. 1955) (state agency managing highway project has sovereign immunity precluding injunction against federally-funded state highway authority); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (collateral attack on agency's order made agency an indispensable party).

the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989). The review also includes the establishment of rates, a matter particularly reserved for "States." *AT&T Corp.*, 525 U.S. at 384.

Congress preserved a primary role for State commissions throughout the process of interconnection agreement review that is unique. No regulated carrier shares a State commission's interest in this type of case. A State commission's interest goes beyond a utility's narrow business interest to the broad public interest. Moreover, the parties want relief from state commission, namely further proceedings to correct what they perceive to be error. Thus, the state is the real party in interest in appeals under section 252(e)(6).

2. Young *Does Not Apply When State Official's Action is Authorized.*

If an error of federal law exists in the challenged PUC determination, the error is insufficient basis to refuse immunity. In these section 252(e)(6) cases, there is no question that federal law authorizes the state commissions (acting through their individual member commissioners) to decide whether to approve or reject proposed interconnection agreements. 47 U.S.C. § 252(e)(1). The power to adjudicate the dispute under federal law includes the power to make an erroneous decision. "Jurisdiction is the power to decide erroneously as well as correctly." 20 AM. JUR. 2D *Courts* § 57 (1995). A state officer acts *ultra vires* only when he acts "without any authority whatever," so that the a claim of error is the exercise of delegated power is not sufficient to lift the bar of immunity. *Pennhurst II*, 465 U.S. at 101 n.11. Thus, where Congress authorizes a state commission to approve or reject an interconnection agreement, the commission members are entitled to immunity when they make their decision. Indeed, under the Third Circuit's analysis, but for the doctrine of absolute judicial immunity (see 46 AM. JUR. 2D *Judges*

§§ 74-77 (1994), federal complaints could be filed against state court judges when the complainant disagrees with the state court's interpretation of a federal statute.

3. *Judicial Review of State Commission Determinations Negates Any Need for Application of* Ex parte Young *In a §252(e)(6) Case.*

Federal Court Review

Judicial review of state commission determinations is available under several avenues. If the Court holds that state commissions waive immunity when they act pursuant to section 252, then review of state commission determinations is available in federal district court and *Ex parte Young* need not apply.[12]

State Court Review

The non-application of the *Ex parte Young* doctrine is further dictated by the availability of state court review, notwithstanding Congress's attempt to prohibit such review. Each state provides for appeals from State commission decisions in state court. It is well established that state courts are presumed competent to review lower tribunal determinations for compliance with federal and state law. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). Where an adequate remedy exists, equity need not apply. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

The present impediment to state court review—an impediment created by Congress in section 252(e)(4) (purporting to prohibit state court review)—cannot withstand judicial scrutiny. Congress lacks authority under the Commerce Clause to sever the relationship between a State court and a

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[12] The United States can also bring suit against a State in federal court. *United States v. Texas*, 143 U.S. 621 (1892).

State commission. No party has cited any authority for Congress having such authority. Having no authority, Congress is prohibited by the Tenth Amendment from requiring State commission decisions to be reviewed in federal courts to the exclusion of state courts. U.S. CONST. amend. X.

The Pennsylvania Constitution and statutes explicitly provide for judicial review of Pennsylvania Commission's orders as of right. PA CONST., art. V, § 9; see also 42 Pa.C.S. § 763 (designating Commonwealth Court of Pennsylvania to hear appeals). This right extends to review of federal questions under section 252. *Bell Atlantic*, 763 A.2d 440. Any disenfranchisement of the Pennsylvania Judiciary, one of the equal and independent branches of Pennsylvania Government, cannot be upheld as consistent with the law or our nation's scheme of federalism.

III. WHEN STATE ADMINISTRATIVE AGENCIES ACT ON BEHALF OF CONGRESS, FEDERAL COURTS SHOULD APPLY A DEFERENTIAL, NOT *DE NOVO*, STANDARD OF REVIEW TO THE AGENCIES' INTERPRETATION OF FEDERAL LAW.

Section 252(e)(6) provides for judicial review and a determination whether the approved agreement "meets the requirements" of the Act, see 47 U.S.C. § 252(e)(6), but does not prescribe the standard for that review. *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), accords the construction of a federal statute by a federal agency deference by reviewing courts when there has been an explicit or implicit delegation of authority to an agency to fill a gap in the statute and the agency interpretation is a reasonable one. *Chevron* deference is warranted when the agency was given the power to make rules carrying the force of law and when the interpretation at issue was promulgated in the exercise of that authority. *United States v.*

Mead Corp., 121 S. Ct. 2164, 2171 (2001). Delegation may be shown by the grant to an agency of power to engage in adjudication or notice- and-comment rulemaking. *Id.* at 2172. Generally, such deference is not accorded to the interpretations of federal statutes by state agencies. 271 F.3d at 516 (App. 34a); *GTE South Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir.1999).

Due to the unique structure of the Act, a state commission's interpretations of federal law, made in reviewing and approving interconnection agreements, should be entitled to the same deference as would the FCC's interpretations if the FCC were primarily responsible for reviewing the agreements. The state commissions possess the same institutional competence as the FCC to make such decisions in the area of telecommunications law. *Local Competition Order*, *supra*; Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 22-23 (1999). If the state commissions enjoy the confidence of Congress, they (and their interpretations of federal law) should enjoy similar confidence from the federal courts. Weiser at 36. State commissions' power to resolve issues in arbitration and to approve or reject interconnection agreements have the force of law beyond the relationship of the parties to the agreement. The approved agreement becomes in effect a tariff to which other carriers can "opt-in." 47 U.S.C. § 252(i). Deference to the state commissions would not conflict with the rulemaking authority of the FCC as state commissions are bound to follow all lawful provisions of the Act and FCC implementing regulations. *AT&T Corp.*, *supra*.

Therefore, a deferential standard of review should be applied to any PUC legal interpretations contained in the arbitration and interconnection agreement.[13]

CONCLUSION

The Court should grant this petition for writs of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

BOHDAN R. PANKIW
Chief Counsel
ROBERT J. LONGWELL
Deputy Chief Counsel
MARYANNE REYNOLDS MARTIN *
Assistant Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

* Counsel of Record

Counsel for Petitioners

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[13] If Petitioners are subject to federal court jurisdiction, a remand to the Third Circuit is required for reconsideration of the directory publishing services issue in light of a deferential standard of review.